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No. 04 - 1252

In the
Supreme Court of the United States
October Term, 2004

AMERICAN PELAGIC FISHING CO, L.P.,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Federal Circuit

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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May 27, 2005

QUESTIONS PRESENTED

Amicus Curiæ New England Legal Foundation supports this Court's consideration of the questions presented by Petitioner American Pelagic Fishing Co., L.P. ("American Pelagic"):

1. Whether the government's authority to regulate a traditional property use is a "background principle" that excludes such a use from the owner's title and allows the government to restrict or abolish the use without ant risk of takings liability.

2. Whether special legislation that targeted a single property owner, deprived that owner's property of all economically viable use, and defeated that owner's reasonable investment-backed expectations was a taking requiring the government to pay just compensation, as the trial court held on an undisputed factual record.

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*

Amicus Curiæ New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views and the views of its supporters concerning the need to protect investment-backed expectations and property rights generally from the unanticipated effects of regulatory change in a highly regulated environment.[1]

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of

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1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that neither counsel for Petitioner nor Respondent authored this Brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon a fair balance in regulation of private property. Many of NELF's members are engaged in industries historically regarded as heavily regulated industries, such as public utilities, banking, and insurance. Protection of long-standing expectations, such as the expectation that, even in heavily regulated industries, investments will enjoy reasonable protection in the event of changing regulatory requirements, is essential to encourage investment in regulated property.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities.[2] *Amicus* believes that serious negative consequences for business investment will flow from the decision of the Court of Appeals in this matter. *Amicus Curiæ* therefore believes that this brief provides an additional perspective which may aid the Court in determining whether to grant this petition for a writ of *certiorari*. Pursuant to

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2 *See, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (U.S. 2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Supreme Court Rule 37.2 (a), counsel for *Amicus* has submitted consents by both parties to the filing of this Brief.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Petitioner American Pelagic Fishing Co., L.P. ("American Pelagic").

SUMMARY OF ARGUMENT

This petition for *certiorari* to the United States Supreme Court deals with the ability of the Government, by retroactive legislation, to strip an owner of property rights without just compensation simply because the owner invested in a regulated industry. The decision below determined that the Magnuson Act, 16 U.S.C. §§ 1801–18, precluded American Pelagic's inclusion of the right to fish in the United States Exclusive Economic Zone ("EEZ") in its bundle of rights in its vessel the *Atlantic Star*. The right of the owners of a fishing vessel to use the vessel to fish is a specific example of the general right to use. The decision below abrogated historic common fishing rights in the high seas, relying solely on the Government's 1986 statutory claim of "sovereign rights" in the EEZ. The Government cannot define away those historic fishing rights simply because it asserted a right to regulate.

ARGUMENT

I. Congress's 1986 assumption of "sovereign rights" over the Exclusive Economic Zone allowed government regulation but did not abrogate longstanding common law fishing rights in this portion of the high seas.

At great expense, approximately $40,000,000, American Pelagic's predecessor purchased and specially outfitted the

Atlantic Star for mackerel fishing in the EEZ. *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1367–68 (Fed. Cir. 2004). American Pelagic received the necessary permits for the *Atlantic Star* to fish for herring and mackerel under the Magnuson Act, 16 U.S.C. §§ 1801–18, which provides the regulatory framework for fishing in the EEZ. Congress then retroactively revoked the permits through politically motivated appropriations riders. *See* Court of Appeals ("CA") Appendix at 3559 (statement of Senator Olympia Snowe); *American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 40–42 (2001), *supplemented*, 55 Fed. Cl. 575 (2003), *rev'd by decision below*, 379 F.3d 1363 (Fed. Cir. 2004). Congress thereby circumvented the Magnuson Act's provisions for determining the need for limitations on affected fisheries. *Id.* In fact, the regulators administering the Act had encouraged American Pelagic's substantial investment in its vessel, the *Atlantic Star*, and raised no environmental concerns with conservation of fish stocks. *American Pelagic*, 49 Fed. Cl. at 42 (Congress acted without consulting fishery officials; government's stock assessment scientist stated that *Atlantic Star*'s entry would have no adverse impact on Atlantic mackerel and herring fisheries).

American Pelagic asserted that the Congressional action constituted a taking of its right to use the *Atlantic Star* to fish, and that it was entitled to compensation under the Fifth Amendment's Takings Clause. The Court of Federal Claims agreed that fishing for mackerel and herring in the EEZ was a right and not merely a matter of governmental grace, awarding more than $37,000,000 in damages to American Pelagic. *American Pelagic Fishing Co. v. United States*, 55 Fed. Cl. 575, 595 (2003), *rev'd by decision below*, 379 F.3d 1363 (Fed. Cir. 2004). *See American Pelagic*, 49 Fed. Cl. at 47 (Government treated fishing in EEZ as "totally a matter of governmental grace."). Reversing

the Court of Federal Claims, the Court of Appeals agreed with the Government that fishing in the EEZ was, in effect, a matter of grace. *American Pelagic*, 379 F.3d at 1377–81. The Court of Appeals determined that the Government did not engage in an uncompensated regulatory taking because American Pelagic had no property right to use the *Atlantic Star* for its only intended purpose, to fish for mackerel and herring. The decision below treated the regulation of fishing permits in the EEZ created by 16 U.S.C. § 1811 as a background principle of law that eliminated any right of fishing vessels to fish in the EEZ. *American Pelagic*, 379 F.3d at 1379.[3]

The Court of Appeals, however, was flatly mistaken in two regards: (1) "sovereign rights" in the EEZ, as asserted by the federal government in the 1986 amendments to 16 U.S.C. § 1811, do not amount to actual sovereignty and are significantly qualified; and (2) even full sovereignty grants the Government power only to regulate fishing resources, and does not extinguish historic rights to fish in the high seas, of which the EEZ is part.

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3 "Because it was already in place by the time American Pelagic purchased the *Atlantic Star*, the Magnuson Act [regulating EEZ fishing] was an 'existing rule' or 'background principle[]' of federal law that inhered in American Pelagic's title to the vessel. *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1031, 1029–30 (1992)]. . . . [A]s far as ownership of the *Atlantic Star* was concerned, the sovereign rights of the United States in the EEZ 'inhere[d] in the title itself, in the restrictions that background principles of the [federal government's] law . . . already place[d] upon . . . ownership.' *Id.* at 1029 . . . . It was against this framework of existing federal restrictions on fishing in the EEZ that American Pelagic invested in the *Atlantic Star*. As of 1996, when the Atlantic Star was purchased, the Magnuson Act and the attendant regulatory scheme precluded any permitted fisherman from possessing a property right in his vessel to fish in the EEZ." *American Pelagic*, 379 F.3d at 1379.

A. *Sovereign rights in the Exclusive Economic Zone are limited, even requiring coastal states to share excess fishing capacity with foreign nations.*

The decision below significantly misstates the legal meaning of "sovereign rights," confusing "sovereign rights" with the more comprehensive term "sovereignty." *Compare American Pelagic*, 379 F.3d at 1378 ("[A]t least as of 1983, the United States had asserted *sovereignty* with respect to the exploration, exploitation, conservation, and management of the natural resources of the EEZ." (emphasis added)) *with* 16 U.S.C. § 1811 ("[T]he United States claims, and will exercise . . . , *sovereign rights* and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone." (emphasis added)). What the United States asserted under the 1986 amendment to the Magnuson Act was not *sovereignty* over the EEZ, but the far more limited *sovereign rights*.

Congress passed the Magnuson Act in 1976 to exercise newly claimed jurisdiction to regulate fishing in a previously unregulated area of the high seas deemed the "Fishery Conservation Zone," which later became the EEZ. *American Pelagic*, 379 F.3d at 1377–78. Even after the 1986 amendment to the Magnuson Act asserting American "sovereign rights" in the EEZ pursuant to evolving international customary law, such rights were limited, and constituted far less than full sovereignty: "A state has complete sovereignty over the territorial sea [up to 12 nautical miles from the coast], analogous to that which it possesses over its land territory [and] internal waters . . . . 'Sovereign rights,' which a coastal state enjoys in its exclusive economic zone and on its continental shelf, are functional in character, limited to specific activities." *Restatement (Third) of the Foreign Relations Law of the*

United States § 511 Comment b (1987).[4] Since 1986, the United States has continued to consider the EEZ part of the high seas. "The *res communis* [international territory], consisting of the high seas which for present purposes include exclusive economic zones . . . is not capable of being placed under state sovereignty." Ian Brownlie, *Principles of Public International Law* 105 (6th ed. 2003).[5]

The "sovereign rights" of the United States to regulate fishing in the EEZ are significantly limited in favor of not only private fisherman, as discussed below, but also foreign nations.[6] "[T]he coastal state is required to determine . . . to the extent that it does not have the capacity to harvest the entire allowable catch, the conditions (including allocation of quotas)

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4 *See Restatement (Third) of Foreign Relations Law* § 514 Comment c ("The coastal state does not have sovereignty over the exclusive economic zone but only 'sovereign rights' for a specific purpose—the management of natural resources and other economic activities.").

5 *See Restatement (Third) of Foreign Relations Law* § 512 Comment b ("[A]s a matter of customary law as well as the [Law of the Sea] Convention, the rights and freedoms of other states in the [EEZ] . . . are the same as on the high seas."), § 514 Reporter's Note 2 ("[T]he maritime states did not insist on expressly designating the [EEZ] as high seas [in the Law of the Sea Convention], but the history of the negotiations indicates that they consider that the zone remains high seas, although it will be subject to exceptional rights in favor of the adjacent coastal state."); Brownlie at 192 ("[T]he rights of the coastal state in [an exclusive economic] zone do not amount to sovereignty, and thus other states have rights exercisable over the high seas except as they are qualified by the existence of jurisdictional zones." (footnote omitted)).

6 *See Restatement (Third) of Foreign Relations Law* § 514 Reporter's Note 4 ("The principle of 'optimum utilization' of the living resources of the EEZ requires that the coastal state arrange for harvesting that surplus."); Brownlie at 201 ("Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements . . . give other States access to the surplus of the allowable catch . . . .").

under which other states are given access to the surplus." *Restatement (Third) of Foreign Relations Law* § 514 Comment f. Thus, because Congress prevented the *American Star* from fishing for excess stock in the EEZ, the United States may be required by international law to open its fishery to allow foreign vessels access to the surplus. Ironically, the protection of American Pelagic's domestic rivals that motivated the revocation of the *Atlantic Star*'s permits may backfire, by allowing access to larger foreign vessels instead.

B. *Even full sovereignty grants only power to regulate fishery, not ownership of fish.*

The decision below also fails to recognize that, even full sovereignty would not give the Government unfettered discretion to dispose of fish within the EEZ as a matter of grace. In fact, the Government's full sovereignty in the territorial sea (within 12 nautical miles of the coast) grants no greater power over maritime property than it does over property on land. "A state has complete sovereignty over the territorial sea [up to 12 nautical miles from the coast], analogous to that which it possesses over its *land* territory [and] internal waters . . . ." *Restatement (Third) of Foreign Relations Law* § 511 Comment b (emphasis added).[7] Sovereignty is not a paramount property right but simply "[t]he normal complement of state rights." Brownlie at 106 ("In brief 'sovereignty' is legal shorthand for legal personality of a certain kind, that of statehood.").

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7 *See Restatement (Third) of Foreign Relations Law* § 512 Comment a ("The rights and duties of a state and its jurisdiction are the same in the territorial sea as in its land territory." (citations omitted)); Brownlie at 105 ("Territorial sovereignty *extends principally over land territory*, the territorial sea appurtenant to the land, and the seabed and subsoil of the territorial sea. . . .") (emphasis added).

A case decided by Justice Stephen J. Field when he was Chief Justice of the California Supreme Court, and relied upon by this Court in its analysis of sovereignty issues, parallels this case in the terrestrial context. *Moore v. Smaw*, 17 Cal. 199, 218 (1861), *cited in United States v. Texas*, 339 U.S. at 719 n. 9. *Moore* distinguishes between the state's administrative rights as sovereign and the state's simple ownership rights over gold and silver mines. The case involved the successor to a United States patentee who extracted a gold from the area of his patent. Under Mexican law, before the United States' acquisition of California, precious metals belonged to the state and did not pass with a grant of land unless explicitly mentioned. California claimed that the gold belong to the state, as a sovereign right passed to it by the United States accompanying its statehood. *Moore* held that such precious metal deposits were held by each respective government as any other public property and were alienable by the United States by patent to private parties. "It is undoubtedly true that the United States held certain rights of sovereignty .... But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of a State than that of any other property, which is the subject of barter and sale." *Moore*, 17 Cal. at 218.[8]

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8 "In this country [sovereign] authority is vested in the people, and is exercised through the joint action of their Federal and State Governments.... To the existence of this political authority of the State—this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same

Moore illustrates how the opinion below confuses sovereignty or "*imperium* (governmental powers of regulation and control)," with "*dominium* (ownership or proprietary rights)." *United States v. Texas*, 339 U.S. 707, 712 (1950). *See id.* at 713 (sovereignty equivalent of *imperium*). "Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority." *Moore*, 17 Cal. at 218. *See United States v. Texas*, 339 U.S. at 719 ("[*D*]*ominium* and *imperium* are normally separable and separate . . . ."). Sovereignty, or *imperium*, may therefore be distinguished from ownership or *dominium*, which can be held publicly or privately:

> The legal competence of a state includes considerable liberties in respect of internal organization and the disposal of territory. This general power of government, administration, and disposition is *imperium*, a capacity recognized and delineated by international law. *Imperium* is thus distinct from *dominium* either in the form of public ownership of property within the state or in the form of private ownership recognized as such by the law.

Brownlie at 106 (footnote omitted).

Without precedent, the Government in this case is asserting exclusive *dominium* in EEZ mackerel and herring,

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manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty." *Moore*, 17 Cal. at 218–19.

precluding private rights, solely by virtue of its *imperium*. The decision below fails to address, however, this Court's highly relevant decision regarding public rights to catch swimming fish in *Toomer v. Witsell*, 334 U.S. 385, 399–402 (1948). This Court in *Toomer* invalidated South Carolina shrimping license fees for non-residents that were 100 times greater than the fees for residents. South Carolina defended on the ground that it owned the fish (including the shrimp) in the territorial sea off its coast and this Court held that any state ownership "rights" were no more than a legal fiction, granting the state regulatory authority, not the right to dispose of "its" shrimp as a matter of grace in violation of the privileges and immunities clause. *Id.*

The decision below failed to cite *Toomer* and instead relied heavily upon discredited dictum from *McCready v. Virginia*, 94 U.S. 391, 394 (1876), to the effect that the States owned "fish in [tidewaters], so far as they are capable of ownership while running." *American Pelagic*, 379 F.3d at 1379. *Toomer*, in fact criticized *McCready*, restricting its application to oysters and similar immobile shellfish. *Toomer*, 334 U.S. 400–02 (shellfish immobile in the soil, part of government *dominium* if not granted away). *Toomer* held that fish are similar to wild game on land, effectively unowned but capable of becoming owned privately when captured. *Id. See* Joseph K. Angell, *Treatise on the Right of Property in Tide Waters* 137, 141 (2d ed. 1847).

> The whole [state] ownership theory [over wild animals], in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.

Toomer, 334 U.S. at 402. *See id* at 402 n.37 ("The fiction apparently gained currency partly as a result of confusion between the Roman term *imperium* or governmental power to regulate, and *dominium*, or ownership. Power over fish and game was, in origin, *imperium*.").[9] The Government's rights in such fish are to regulate the means of their capture so as best to preserve the resource. Roscoe Pound, *An Introduction to the Philosophy of Law* 111 (2d ed. 1954). American Pelagic's use of the *Atlantic Star* was permissibly consistent with preservation of these resources in accordance with longstanding understanding of the Government's sovereign right to regulate, *American Pelagic*, 49 Fed. Cl. at 51; it was not, however,

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9 The nature of the Government's rights in fish and game are best described by Dean Roscoe Pound in the analysis relied upon by this Court in *Toomer*: "In modern law, as a result of the medieval confusion of the power of the sovereign to regulate the use of things (*imperium*) with ownership (*dominium*) and of the idea of the corporate personality of the state, we have made [*res publicae*] into property of public corporations. . . . We are also tending to limit the idea of discovery and occupation by making *res nullius* (e.g. wild game) into *res publicae* and to justify a more stringent regulation of individual use of *res communes* (e.g. of the use of running water for irrigation or power) by declaring that they are property of the state or are 'owned by the state in trust for the people.' It should be said, however, that while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, **in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*.** The state as a corporation does not own a river as it owns the furniture in the state house. It does not own wild game as it owns the cash in the vaults of the treasury. **What is meant is that the conservation of important social resources requires regulation of the use of *res communes*** to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom *res nullius* may be acquired in order to prevent their extermination." Roscoe Pound, *An Introduction to the Philosophy of Law* 111 (2d ed. 1954) (bold emphasis added), *cited in Toomer*, 334 U.S. at 402 n.37.

consistent with the political desire to protect existing fisherman from competition.

The decision below similarly disparaged historic support for free fishing rights in the high seas covered by the Magnuson Act's EEZ. As argued by Petitioner, the right to fish in the high seas and public waters is of ancient provenance. Petition at 12–13 & n.5. The decision below nevertheless baldly asserts that the Magnuson Act "does not explicitly, or implicitly, preserve any potential pre-existing common law right to fish in the EEZ." *American Pelagic*, 379 F.3d at 1380. The decision ignores the fact that the EEZ was created in light of longstanding common law fishing rights in the portion of the high seas that became part of the EEZ.[10] Statutes such as the Magnuson act, "which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen v. Johnson*, 343 U.S. 779, 783 (1952)). It was not incumbent on Congress to include

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10 *See* Angell at 124 ("Fishery in the sea . . . constituting as it does, a great source of sustentation, has in all ages and in all countries been deemed of such importance, that it has ever been regarded a privilege open and common to all persons."). *See also id.* at 142–43; Sir Matthew Hale, *De Jure Maris*, in Stuart A. Moore, ed., *A History of the Foreshore* 370, 377 (3d ed. 1888) ("[T]he common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it . . . ."); 3 James Kent, *Commentaries on American Law* *412–13 (Oliver Wendell Holmes, ed., 12th ed. 1873) ("[T]he right of fishing in the seas . . . under the free . . . genius of the English common law, is a right public and common to every person . . . . The common right of fishing in navigable waters is founded on such plain principles of natural law, that it is considered by many jurists as part of the law of nations.").

explicit reservations extending the common law right to fish in the EEZ; rather, Congress would have had to exclude such common law fishing rights expressly if it had intended to attempt to abolish them through the Magnuson Act.

As discussed above, the opinion below disregarded (1) *Toomer*'s holding that the Government's power over fish in the high seas is one of regulation and not ownership and (2) the canon of statutory construction that the Magnuson Act should be interpreted to be consistent with the common law public rights to free fishing in the high seas. This Court should grant *certiorari* because the decision below "conflicts with relevant decisions of this Court" on the important federal question whether private investments to exploit the resources of the EEZ are ephemeral because all activity in the EEZ is simply a matter of government grace. Sup. Ct. R. 10 (c).

II. A recently enacted regulatory scheme which encouraged American Pelagic to invest cannot be transformed into a background principle of law in order to strip American Pelagic's property of Takings Clause protections.

As discussed above, Congress amended the Magnuson Act in 1986 in part to claim sovereign rights in the EEZ under new customary law as largely codified in the Law of the Sea Convention. *American Pelagic*, 379 F.3d at 1377–78. Nevertheless, contrary to this Court's strict admonition in *Palazzolo* that "background principles" must rest on longstanding legal traditions, the opinion below treated the Magnuson Act's relatively recent regulatory scheme as a background principle of law shaping the meaning of American Pelagic's property in the *Atlantic Star*. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) ("[O]ur description of the concept

[of background principles] in *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] . . . is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition, see *id.* at 1029–30."); *Lucas*, 505 U.S. at 1029 ("Any limitation so severe *cannot be newly legislated or decreed* (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." (emphasis added)). Background principles thus rest on long-standing legal traditions, not novel enactments like the Magnuson Act. As argued by the Petitioner, Petition at 14–16, this Court ruled in *Palazzolo* that novel regulations passed before acquisition of property (the *Atlantic Star* in this case), like the Magnuson Act cannot be considered "background principles." *See Palazzolo*, 533 U.S. at 630 (a regulatory taking "claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction").

As urged by Petitioner, Petition at 4–5, 15, regulatory enactments should be treated in the analysis of a property owner's investment-backed expectations under the partial regulatory taking test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 127–28 (1978). *See Palazzolo*, 533 U.S. at 635–36 (O'Connor, J., concurring). Such novel regulations cannnot be background principles defining an underlying property interest. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003).[11] Moreover, as

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11 "Before examining the critical question about reasonableness . . . , we start with an analysis of the [property owners'] actual expectation because we require actual expectation of, or reliance on the government not nullifying the [property owners'] . . . regulatory rights as a threshold matter. The [property owners'] expectation . . . would not really be 'investment-

determined by the factfinder in this case, American Pelagic reasonably expected to use the *Atlantic Star* to fish in the EEZ. *American Pelagic*, 49 Fed. Cl. at 49–51.

In this case, the decision below used the Magnuson Act's regulation of fishing rights as justification for denying property protections to American Pelagic's investment in the *Atlantic Star* simply because of the passage of the Act. The decision's logic, at its narrowest, deprives all fishing vessel owners of any property right to use their vessels for their intended purpose, to fish. All use of the EEZ for fishing or for other purposes, such as oil and gas exploration, regardless of how significant the financial investment, would be entirely a matter of governmental grace, subject to cancellation at any time because the authority for the Government's regulation of industry derives from its rights as sovereign. More broadly applied, the opinion's sweeping language, 379 F.3d at 1376–83, eliminates property protections for any investment made in a regulated industry. The decision below thereby stretches *Lucas*'s concept of background principles beyond the breaking point, eviscerating investors' expectations.

Moreover, the opinion below contravenes the purpose of background principles, which is to prevent harm to public resources. *Palazzolo*, 533 U.S. at 629–30.[12] In this case, the

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backed' unless they actually believed in a certain outcome and entered the program in reliance on it." *Cienega Gardens*, 331 F.3d at 1346.

12 "It is asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment. . . . The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. See *id.* at 1030 (*'The "total taking" inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of*

Government's fishing stock assessment scientist explicitly discounted any scientific basis for revoking the *Atlantic Star*'s fishing permits. *See American Pelagic*, 49 Fed. Cl. at 43. Based on this Court's teaching, the concept of background principles of law cannot be used to undermine property protections for investments made after an industry became subject to some largely unrelated regulation. The decision below contradicts both *Lucas* and *Palazzolo*. This Court should grant *certiorari* because the Court of Appeals for the Federal Circuit, with jurisdiction over all claims for regulatory confiscations against the federal government, has misinterpreted this basic component of Takings Clause jurisprudence.

III. The Court of Appeals decision below conflicts with decisions of state courts and other federal Courts of Appeal that recognize investment in regulated industries as a property interest worthy of protection.

The Petitioner brings to this Court's attention a number of decisions by other federal Courts of Appeals and by state courts that conflict with the clear import of the decision below. Petition at 19–20. The decision below also directly contradicts a number of recent decisions of the Federal Circuit itself, which acknowledge that investments made in an economic sector subject to significant regulation may nevertheless warrant protection from regulatory takings as a property interest. *Cienega Gardens*, 331 F.3d at 1350.[13] Other panels of the Court of

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harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities'). A law does not become a background principle for subsequent owners by enactment itself." *Palazzolo*, 533 U.S. at 629–30 (emphasis added).

13 "A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that *all* regulatory changes

Appeals for the Federal Circuit have even held that the federal navigational servitude is not a complete defense to recovery for a regulatory taking. *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000); *Loveladies Harbor, Inc. v. United States*, 21 Ct. Cl. 153, 154 n.3 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994).

State courts interpreting the federal Constitution agree that the existence of a permitting system constitutes recognition that property rights exist in regulated property because regulation implies that permits will in fact be granted. *See Vatalaro v. Department of Envtl. Reg.*, 601 So. 2d 1223, 1229 (Fla. App.), *review denied*, 613 So. 2d 3 (Fla. 1992); *Picciolo v. Jones*, 534 So. 2d 875, 878 (Fla. App. 1988), *review denied*, 544 So. 2d 200 (Fla.), *cert. denied*, 493 U.S. 848 (1989).[14] *See also Palm Beach Isles*, 231 F.3d at 1364 ("The existence of a regulatory regime does not per se preclude all investment-backed expectations for development.").

In this case, the Government completely destroyed any ability of the *Atlantic Star* to fish for the two underfished species of fish for which that the ship was specially outfitted.

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are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever. . . . For expectations to be 'greatly reduced' does not mean that the reasonableness of every expectation of the status quo is by definition eliminated. . . . The range of expectations that is reasonable may be reduced in proportion to the amount of regulation, but this is not a blanket rule that disqualifies parties' expectations without inquiry." *Id.* (emphasis in original) (citations omitted).

14 "The fact that [property] is subject to the regulatory power of the State . . . does not conclude the matter; the power to regulate does not . . . permit a taking for public use without payment to the owner of just compensation." *Id.* (access channel to lake dredged in 1930s, permitting tidal inflow and authorization to regulate, not subjecting the property to public trust).

As determined by the Court of Federal Claims, the Government's action (taken by Congress and aimed specifically at the *Atlantic Star*) was outside the normal regulatory scheme and, manifestly, not what a reasonable investor could have expected, especially one who was encouraged to go into the specific market (herring and mackerel fishing) by the Government itself. *American Pelagic*, 49 Fed. Cl. at 49–50. The court found that American Pelagic's "expectation of being able to use its vessel to fish for Atlantic mackerel was ... reasonable." 49 Fed. Cl. at 49.[15]

American Pelagic invested in the *Atlantic Star* in a manner similar to the property developers whom the Government encouraged to invest in subsidized housing in *Cienega Gardens*. The decision below conflicts not only with this Court's precedents and earlier decisions of the Court of Appeals for the Federal Circuit recognizing property rights in investments made in regulated industries. The decision below also conflicts with decisions of other Courts of Appeals, as detailed by Petitioner, and those of state courts. *See Vatalaro*, 601 So. 2d at 1229; *Picciolo*, 534 So. 2d at 878. This Court should grant *certiorari* to reconcile the difference among the circuits and between the Court of Appeals for the Federal Circuit and the state courts on this critically important question of the Takings Clause protection afforded to regulated property.

CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioner American Pelagic for a writ of

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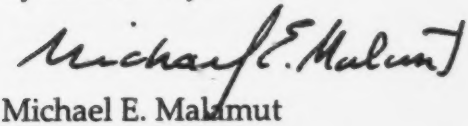
15 "Indeed, the government ... induced plaintiff to make its investment in the *Atlantic Star*.... [American Pelagic] could not have anticipated that Congress would single it out to revoke its permits by legislation." *Id.*

certiorari.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,



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